IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
December 6, 2004 Session

IN RE: ESTATE OF LEWIS F. RHOADES

Appeal from the Probate Court for Hamblen County
No. 18-P63 Herbert M. Bacon, Judge

No. E2003-03094-COA-R3-CV - FILED APRIL 28, 2005

Donald L. Rhoades ("the Executor") filed to probate the will of Lewis F. Rhoades ("the Testator"). The Testator was survived by three children – the Executor, Geraldine Miller,[1] and Bonnie Matthews Turner. Shortly after the death of the Testator in 1999, the Executor "informally" distributed the Testator's property by dividing the proceeds from a certificate of deposit held jointly in the names of the Executor and the Testator, and by dividing the balance in a checking account held jointly by the Testator and his two daughters. Title to both assets was held in the joint names indicated with "right of survivorship." It was not until 2003 that the Executor offered the Testator's will for probate. At that time, he also sought a declaration as to the ownership of the certificate of deposit and the checking account, and further asked the court to order that the previously-distributed proceeds from these assets be returned to the estate. The trial court held that the proceeds could not be recovered since the certificate passed to the Executor in his individual capacity outside of probate. As for the checking account, the trial court ordered that the distributed proceeds be returned to the estate to satisfy the claims of creditors. The Executor appeals. We agree with the trial court that the certificate of deposit passed by operation of law to the Executor in his individual capacity and, hence, passed outside of probate. Consequently, the proceeds previously distributed by the Executor could not be recouped in the probate court proceedings. However, we disagree with the trial court's judgment that the checking account proceeds should be returned to the estate, as we hold that this account also passed by operation of law to the joint owners of the account and, consequently, cannot be returned to the estate of which it was never a part. Accordingly, we affirm in part and reverse in part.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Probate Court Affirmed in Part; Reversed in Part; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which D. MICHAEL SWINEY and SHARON G. LEE, JJ., joined.

Hugh P. Taylor, White Pine, Tennessee, for the appellant, Donald L. Rhoades, Executor.

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[1] Geraldine's name is sometimes spelled as "Jerald Dean." We will refer to her as "Geraldine."

No appearance on behalf of Geraldine Miller and Bobbie Matthews Turner.

OPINION

I.

The Testator died on May 12, 1999. At the time of his death, the Testator had in his possession the following: a certificate of deposit, titled in his name and that of the Executor; a checking account, which he owned jointly with his two daughters; various farming equipment; and a number of other items of personal property.

In his will dated January 9, 1997, the Testator provided that, in the event his wife predeceased him, his estate was to be distributed as follows:

> Several years ago I made deeds to my children of all of my real estate, reserving a life estate. I ratify these deeds, and each child is to have that real property deeded to him, or her;
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> I bequeath the 3000 Ford Tractor, 35 Massey Ferguson, 12 inch turning plow, disc harrow, two bush hogs, sub-soiler, and all other farm equipment, to Bobbie Matthews and Donald Rhoades, in equal shares;
>
> I bequeath all handguns, long guns, and my father's pocket watch to Donald Rhoades;
>
> I bequeath the sum of $5,000 to my daughter Bobbie Matthews;
>
> I bequeath all cash, bank accounts, and CD's to Bobbie Matthews, Donald Rhoades, and Jeraldean Miller in equal shares

(Numbering in original omitted).

Upon the Testator's death, his three children equally divided the cash in the Testator's wallet. Subsequently, the Executor and one of his sisters, Ms. Miller, went to First Tennessee Bank to examine the contents of the Testator's lockbox. There they found a certificate of deposit in the name of the Testator and the Executor, with a notation that it was held by them as "joint tenants with right of survivorship." The certificate was in the amount of $28,839.27. Testimony at the hearing revealed that an earlier certificate of deposit, which designated Ms. Turner as the joint tenant, was cashed in on January 19, 1999. The Testator used $5,800 of the proceeds for a prepaid funeral plan and subsequently obtained a new certificate of deposit with the funds that remained. This second certificate designated the Testator and the Executor as the joint tenants. The Executor cashed in this

certificate of deposit on May 19, 1999, and distributed the proceeds among the Testator's children. The Executor retained $7,946.31 for himself, and delivered a cashier's check for $7,946.31 to Ms. Miller. He delivered a cashier's check in the amount of $12,946.42 to Ms. Turner, which amount included the $5,000 bequest to her as set forth in the Testator's will.

The Testator's checking account was in the names of the Testator; Ada Rhoades, the Testator's deceased wife; and Ms. Miller. These three names were indicated on the signature card for the account. Ms. Turner was later added as a signatory.[2] The Executor was not named on the account. However, on July 6, 1999, the Executor was able to close the account by using his power of attorney. Although the Executor testified at the hearing that he distributed the proceeds from the checking account in equal amounts to himself and his sisters, both sisters testified that they received no money from the Executor other than the funds from the certificate of deposit in May, 1999.

On July 10, 2003 – approximately four years after the Testator's death – the Executor filed the instant petition seeking to probate the Testator's will. By order entered July 10, 2003, the probate court ordered that the will be admitted to probate. The Executor subsequently filed a motion for declaratory relief. In the motion, he averred that, upon discovering the certificate of deposit, he cashed it in and distributed the proceeds to himself and his siblings. He testified that he believed that the certificate was property of the Testator, and, therefore, governed by the terms of the will. He stated that, in March, 2003, he learned that the certificate of deposit was actually his property and not that of the estate, since it passed to him by operation of law upon the death of the Testator. Consequently, the Executor sought from the trial court

> a declaration as to whether such certificate of deposit was property owned by the Estate of the [Testator], or alternatively, was the sole property of [the Executor] at the time such certificate of deposit was cashed. Such certificate of deposit was a binding and legally enforceable contract by and between [the Testator], [the Executor] and the bank; such funds were paid by [the Executor] to the Beneficiaries of the Estate as a mutual mistake of fact and law; and an actual, justiciable controversy based on that contract and erroneous payment exists between [the Executor] and his sisters, Bobbie Rhoades Turner and Geraldine Rhoades Miller, all of whom are beneficiaries under the will of [the Testator].

With respect to the checking account, the Executor averred that

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[2]There is no documentary evidence demonstrating the time or manner in which Ms. Turner was added as a signatory to the account. However, the bank statement for January, 1999, includes her name. Ms. Ricker, the representative from First Tennessee Bank, testified that Ms. Turner was, in fact, a signatory on the account. Ms. Turner also signed several checks, which were admitted into evidence. The Executor does not dispute that Ms. Turner was a co-owner of this account.

> all of the cash and money in the checking account of [the Testator] was divided equally by and between [the Executor], Bobbie Rhoades Turner and Geraldine Rhoades Miller, as specific and/or residuary beneficiaries under the will of [the Testator]. Because [the estate] was rendered insolvent by the distribution of the cash found upon [the Testator's] person, and additionally, by the distribution of the monies of [the Testator's] checking account, [the Executor] prays for all such monies to be returned to the [estate] by Bobbie Rhoades Turner, Geraldine Rhoades Miller and [the Executor], in order that an accounting of such funds and other assets of the [estate] may be made, and to pay the administrative expenses of such estate.

The Executor also sought a declaration of the parties' rights relative to the tractors, household items, and tools bequeathed under the will. In particular, he asked the court to approve certain sales and consignment of these items so that the funds could be used for the benefit of the estate.

On August 14, 2003, the trial court held a hearing on the Executor's motion. The sisters testified that they were satisfied with the distribution of the Testator's estate. It was their opinion that the filing of the Executor's petition was prompted by a suit brought by Ms. Turner in Chancery Court. In that suit, Ms. Turner sought to enforce a promissory note of $10,000 signed by the Executor in his individual capacity.

Both sisters stated that they had not received any money from the Executor other than the distribution from the certificate of deposit in May, 1999.

The trial court filed its memorandum opinion on October 13, 2003, in which it declined to grant the relief sought by the Executor. The trial court held that the certificate of deposit was not a part of the estate because (1) at the time the proceeds from it were distributed, no estate had been created, and (2) the Executor disbursed funds in his individual capacity and therefore, cannot claim any interest in those funds in his representative capacity. The trial court, relying on the sisters' testimony, held that they did not receive any of the funds in the checking account. The court directed the Executor, in his individual capacity, to return these funds to the estate for the benefit of creditors. The Executor appeals the judgment of the trial court.

II.

The Executor raises several issues regarding the proceedings below and the trial court's judgment. His primary issue, however, challenges the trial court's judgment that the proceeds from the certificate of deposit passed outside the estate and cannot be recovered, but that funds from the checking account had to be returned to the estate. The Executor argues that if the trial court has jurisdiction to order the return of the checking account funds, it is within the court's authority to order that the proceeds from the certificate be returned as well.

III.

Our review of this non-jury case is *de novo* upon the record of the proceedings below. There is, however, a presumption of correctness as to the trial court's findings of fact – one that we must honor unless the evidence preponderates against those findings. Tenn. R. App. P. 13(d). We accord no such deference to the trial court's conclusions of law. ***Ganzevoort v. Russell***, 949 S.W.2d 293, 296 (Tenn. 1997).

IV.

We will first address the trial court's judgment that the certificate of deposit passed outside the Testator's estate. That certificate was jointly held by the Executor and the Testator, and carried with it a "right of survivorship." The language on the certificate provides that "[s]hould this account be in the names of, payable to, or subject to withdrawal by two or more natural persons, depositor(s) designate(s) ownership interests shown in the account title above or as checked." The option of "joint tenants with right of survivorship" was checked.

Tenn. Code Ann. § 45-2-703 (2000) provides that, for accounts opened after January 1, 1989 – and the certificate before us was opened after that date – "[a] designation of 'joint tenants with right of survivorship,' or substantially similar language, *shall be conclusive evidence in any action or proceeding of the intentions of all named that title vests in the survivor*." Tenn. Code Ann. § 45-2-703(e)(1) (emphasis added). This statute was alluded to in the case of ***In re Estate of Nichols***, 856 S.W.2d 397 (Tenn. 1993). In ***Nichols***, the Supreme Court addressed six certificates of deposit opened before January 1, 1989, and one certificate taken out after that date. ***Id***. at 399. As to the latter certificate, the court held that it was "controlled by the provisions of [Tenn. Code Ann.] § 45-2-703(c) - (f) [(Supp. 1992)]." ***Id***. In quoting subsection (e)(1) of that statute – which was, then and now, as set forth in this opinion – the court italicized the word "conclusive" for emphasis. ***Id***. In holding that the certificate opened after January 1, 1989, passed to the surviving joint tenant, the court stated that "the record supports no disposition of that certificate contrary to this statute." ***Id***.

In the instant case there is no proof, or even an allegation, that, in taking out the certificate, the Testator did so because of fraud, duress, or undue influence. Under these circumstances, the wording of the certificate is "conclusive evidence . . . that title vests in the survivor." Tenn. Code Ann. § 45-2-703(e)(1). Accordingly, we hold that the certificate passed to the Executor by operation of law and, accordingly, was properly excluded by the trial court from the probate proceedings.

V.

While we agree with the trial court's judgment that it should not address the parties' dispute with respect to the proceeds from the certificate of deposit, we do not concur in that court's judgment regarding the checking account at issue in this case.

The checking account was in the names of the Testator; his now-deceased wife, Ada V. Rhoades; and his daughter, Geraldine Miller. Testimony at the hearing showed that the Testator's other daughter, Bonnie Matthews Turner, was later added as a signatory. On the signature card, a box next to the question, "Right of survivorship?" is checked "Yes." At the hearing, Ms. Ricker, an employee of First Tennessee Bank, testified that the checking account, at the time of the Testator's death, was titled in the names of the Testator, Geraldine Miller, and Bobbie Matthews Turner, and that the account was held in the form of a joint tenancy with "right of survivorship."

The checking account was opened on November 27, 1987. Since it was opened prior to the effective date of Tenn. Code Ann. § 45-2-703, we look to the law existing prior to the statute's enactment, as set forth in ***Lowry v. Lowry***, 541 S.W.2d 128 (Tenn. 1976). *See* ***Nichols***, 856 S.W.2d at 399. As the signature card for the checking account contained "an agreement in clear and unambiguous language that a joint account with rights of survivorship is intended," the proceeds of the account passed, upon the death of the Testator, by operation of law to the co-owners – Ms. Miller and Ms. Turner. ***Lowry***, 541 S.W.2d at 132. Consequently, since there is no claim of duress, fraud or undue influence with respect to the opening of the checking account in this manner, that account – like the certificate of deposit – passed to the surviving joint tenants when the Testator died.

VI.

In its opinion, the trial court stated the following in support of its decision not to order the return of the proceeds from the certificate of deposit:

> (b) [The Executor] now seeks this relief as Executor of an estate naming [him] as Executor which was created more than four (4) years after the distribution of the funds which were the proceeds of the CD, and the said [Executor] in his fiduciary capacity as Executor never disbursed any funds to his sisters and himself, and as the Executor of Testator's estate the said [Executor] has no claim to the funds or any interest in same. The relief he seeks in his official capacity as Executor is asking the Court to require the sisters to return funds to an estate which did not exist at the time funds were received by the sisters, and if the assertion by [the Executor] is correct that the CD funds belonged personally to him, then he has no legal right to seek the recovery of same for the estate in his official capacity as Executor.
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> (c) As a part of his motion . . . he says the funds should be returned to the estate for payment to [the Executor] as a debt of the estate. At the time [the Executor] surrendered the certificate and obtained the cash therefrom the funds in question were not part of the estate of Testator and never became a part of Testator's estate for the reason that the proceeds were distributed some four (4) years before an estate

> was ever created. Moreover, at the time [the Executor] made the distribution he acted in a personal capacity and certainly not in a fiduciary capacity for the reason that the Will of Testator had never been probated and the said [Executor] had never been appointed Executor. Also, if the assertion of [the Executor] that the CD became his upon the death of Testator, then the proceeds therefrom passed outside the estate of Testator, and the relief the Executor is seeking herein would need to be sought in another Court.

(Underlining in original). With respect to the checking account, however, the trial court held the following:

> [the Executor] in his personal capacity claims to have distributed the funds in the checking account of Testator to his two sisters and himself in equal amounts. The sisters deny that they ever received any proceeds from the checking account, and by law the now Executor must replace said funds in the estate for the benefit of any creditors that may file claims during the period allowed for such claim filing. These funds along with funds received from the sale of the personal property must be totally depleted by creditors claims and the administration expenses, and there must yet be unpaid claims after such depletion before the estate can be considered insolvent.

We hold that it was not within the jurisdiction of the probate court to do anything with respect to the proceeds from the certificate of deposit *or* the checking account since title to these assets devolved to others at the time of the Testator's death. The Executor refers us to a litany of cases in support of his argument that the probate court had jurisdiction to order the proceeds of the checking account returned to the estate. *See* ***Browne v. Browne***, 547 S.W.2d 239, 240 (Tenn. 1977) (conferring jurisdiction on the probate court to determine whether certain personalty had been given to a third-party by the decedent or was part of the estate); ***Teague v. Gooch***, 333 S.W.2d 1, 6 (Tenn. 1960) (permitting the probate court to determine whether the administrator failed to charge himself with money paid just prior to the decedent's death); ***In re Love's Estate***, 145 S.W.2d 778, 782 (Tenn. 1940) (enabling the county court to make a full and proper accounting of the estate, making all proper charges against the administrator). However, in all of these cases, the probate court was simply determining whether the personal representative had title to a particular asset. In the instant case, the Executor does not dispute that both the certificate of deposit *and* the checking account passed outside the estate. Since both passed by operation of law to their respective co-owners, they were not assets of the estate to be probated. There are cases where the probate court has ordered the return of proceeds that were *improperly excluded from the estate*. *See* ***Pawlakos v. Pawlakos***, No. 01A01-9708-CH-00443, 1998 WL 830929, at *6 (Tenn. Ct. App. W.S., filed December 2, 1998). However, we have found no cases in which the probate court has ordered that assets passing outside of probate be returned to an estate of which they were never a part.

VII.

The Executor raises several other issues pertaining to the action of the trial court in sustaining objections to testimony regarding the Executor's motivation for bringing this action; the court's failure to render specific findings of fact relative to the sisters' credibility; and the failure of the trial court to permit him to obtain additional discovery relative to the sisters' individual bank accounts. Since we hold that both the certificate of deposit and the checking account passed by operation of law, these issues are now moot. Assuming, without deciding, that the Executor, *in his individual capacity*, or his siblings have a claim against the other pertaining to the certificate of deposit or the checking account, those claims cannot be pursued in a probate proceeding.

VIII.

The judgment of the trial court is affirmed in part and reversed in part. This matter is remanded to the trial court for further consideration of such issues as may be properly pursued in probate. Exercising our discretion, we tax the costs on appeal to the Executor, Donald L. Rhoades.

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CHARLES D. SUSANO, JR., JUDGE